Supreme Court, U.S.
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No. 82-5812

In the Supreme Court of the United States

OCTOBER TERM, 1982

DOUGLAS JAMES SCANLON,

Petitioner,

v.

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a private action claiming employment discrimination under section 504 of the Rehabilitation Act of 1973, is it an essential element thereof that the federal financial assistance alleged to have been received by the employer be for the primary purpose of providing employment?

2. Does the immunity provided by the Eleventh Amendment to the United States Constitution bar actions against states and their agencies under section 504 of the Rehabilitation Act of 1973?

3. Must the plaintiff in a private action under section 504 of the Rehabiltation Act of 1973, in which he or she alleges discriminatory practices by a recipient of federal financial assistance, also allege and demonstrate that there exists a programmatical nexus between the assistance and the discriminatory practice?

RELATED CASE

A petition for writ of certiorari is currently pending in another case before this Court which presents the same issue as that stated above as No. 1 under Questions Presented. *Le Strange v. Consolidated Rail Corp.*, Docket No. 82-862, petition filed November 22, 1982.

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DOUGLAS JAMES SCANLON,

Petitioner,

v.

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Atascadero State Hospital and California Department of Mental Health[1] herewith present their Brief In Opposition and respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's decision in this case.

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[1] Respondent Atascadero State Hospital is a corporation created by statute which is under the jurisdiction and control of respondent Department of Mental Health. (California Welfare and Institutions Code section 4100 *et seq.*)

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 677 F.2d 1271 and is also reprinted in Appendix A to the petition. The opinion of the District Court is unreported but is set forth in Appendix B to the petition.

JURISDICTION

Petitioner asserts jurisdiction for review under 28 U.S.C. § 1254(1). Respondents in Argument II *infra* urge that jurisdiction over these respondents is lacking for reasons of sovereign immunity.

STATEMENT OF THE CASE

Petitioner's complaint alleges that he is a handicapped individual who in 1978 applied for but was denied employment in a specific position with respondent Atascadero State Hospital. He asserts that said respondent declined to hire him because of his handicaps. (Complaint, ¶ ¶ 8-11, 26.)

He also alleges that both of the respondents are recipients of federal financial assistance. (Complaint, ¶ ¶ 4-5.) The complaint does not, however, describe the nature of that assistance, its purpose, or what connection, if any, that assistance bore to the program or employment position for which petitioner had applied.

The complaint purports to state a claim pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; see Appendix D to petition, pp. 39-40) and on pendent state grounds, under which petitioner seeks declaratory, injunctive and monetary (back pay) relief.

Respondents moved to dismiss the action on two grounds: (1) that they were immune from suit in federal court in private actions under section 504 by reason of the

Eleventh Amendment to the United States Constitution; and (2) that petitioner had failed to allege an essential element of a claim under section 504, to wit, that the federal assistance allegedly received by respondents was for the primary purpose of providing employment.

The District Court, while rejecting the second stated grounds, granted respondents' motion on the basis of the Eleventh Amendment defense.

The Court of Appeals, on the other hand, accepted the premise of the second grounds and affirmed the order of dismissal on that basis, thus never reaching the sovereign immunity question. In so ruling, the Ninth Circuit adopted the holding in *Trageser v. Libbie Rehab. Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. den.* 442 U.S. 947 (1979).

The *Trageser* decision, and those of subsequent Circuits, held that the claimant in a section 504 action must plead and demonstrate that the federal financial assistance received by the alleged discriminatory employer was for the purpose of providing employment. This conclusion was reached by the *Trageser* court upon a reading and analysis of the relevant provisions of both the Rehabilitation Act and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*).

Section 505(a) (2) (29 U.S.C. § 794a(a) (2); see Appendix D to petition, pp. 40-41) incorporates the remedies, procedures and rights set forth in Title VI for purposes of actions pursuant to section 504 of the Act. One such provision of Title VI precludes actions thereunder except where a primary objective of the federal financial assistance is to provide employment. (42 U.S.C. § 2000d-3; see Appendix D to petition, pp. 41-42.) *Trageser* and the Circuit decisions embracing it found that this limitation on Title VI actions applied, as well, to claims under section 504 of the Rehabilitation Act.

In that the complaint at issue here makes no allegation as to the purpose of the federal financial assistance received by respondents, the Court of Appeals below affirmed the dismissal of the action on these statutory grounds, finding it unnecessary to decide the constitutional question regarding states' immunity. For the reasons stated in the Argument portion of this brief, respondents suggest that a resolution of this *Trageser* rule does not avail petitioner because there exist other independent and valid defenses to the action which he cannot overcome. In such circumstances, the instant petition for writ of certiorari is in the nature of a request for an advisory opinion.

SUMMARY OF ARGUMENT

Although petitioner couches the issue which he seeks to be reviewed in the form of three different questions, there is essentially only one question which he has presented. It can be stated as follows: In a private action claiming employment discrimination under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), is it an essential element thereof that the federal financial assistance alleged to have been received by the employer be for the primary purpose of providing employment?

While the foregoing issue is raised as a result of the Ninth Circuit opinion below, respondents contend that a resolution in petitioner's favor on this question would not alter the result reached by both of the lower courts in this case. This is so because, first, the claim of respondents to immunity under the Eleventh Amendment, which was the basis for the District Court's dismissal of this action, but which was not an issue reached by the Ninth Circuit, remains a valid defense to the entire action. *Cory v. White*, _____ U.S. _____, 102 S.Ct. 2325, 72 L.Ed. 2d 694 (1982).

In addition, there has emerged in recent cases an element, independent from that framed in the petitioner's question above, which must be alleged and demonstrated before a cognizable claim under section 504 of the Rehabilitation Act will be deemed to have been stated. This principle requires that there be a programmatical nexus between the program for which assistance is received and the program as to which the claimant alleges discrimination. *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982).

Respondents further suggest that this Court's recent adoption of the same requirement in analogous circumstances under Title IX of the Civil Rights Act of 1964 confirms the requisite nature of this element of program specificity. *North Haven Bd. of Ed. v. Bell*, _____ U.S. _____, 102 S.Ct. 1912, 72 L.Ed. 2d 299 (1982). In that case the Court held that termination of an offending recipient's financial assistance by the federal agency is "limited to the particular entity and program in which such noncompliance has been found." *Id.*, 102 S.Ct. at 1926. Respondents contend that, to similar effect, the plaintiff in a private action under the Rehabilitation Act must allege and demonstrate a programmatical nexus between the program receiving assistance and the program in which discrimination is claimed.

When the allegations of petitioner's complaint are tested against this latest requirement it is seen that the pleading is fatally defective. As with the sovereign immunity defense, resolution of the question presented by petitioner again would not insulate this action from dismissal on other valid grounds.

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Court Should Deny The Petition Because There Exist Independent Grounds For Dismissal Of The Underlying Action

The proceedings in this matter extended no further than the filing of petitioner's complaint and the granting of respondents' motion to dismiss. It is against the bare allegations of that complaint, taken as true, that one must test whether petitioner has brought a viable claim under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).

Petitioner urges review by this Court essentially on the grounds that there exists a conflict in the Circuits concerning one possible essential element of a claim under section 504. In connection therewith, petitioner contends that those Circuits are in error which have concluded that the plaintiff in a section 504 action must allege and demonstrate that the subject defendant is a recipient of federal financial assistance which has as its primary purpose the providing of employment.

Respondents oppose the instant petition for the reason that resolution of the perceived conflict in the Circuits will not validate petitioner's action for reasons, other than that just described, which appear from the face of the complaint. Consequently, even if petitioner were to prevail on the question(s) he has presented, his action below would still be fatally defective and subject to dismissal. A grant of certiorari, under these circumstances, then, would not appear to be warranted. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

II.

The Eleventh Amendment To The United States Constitution Bars Actions Under Section 504 Of The Rehabilitation Act Of 1973 Against States And Their Agencies

As noted at pages 5-6 of the petition, the Court of Appeals did not reach the constitutional issue, which was the grounds relied upon by the District Court in its dismissal of this action. It is submitted by respondents that this jurisdictional grounds, i.e. sovereign immunity under the Eleventh Amendment to the United States Constitution, remains a separate and valid defense to the underlying action. As such, whatever may be the merits of petitioner's statutory argument with respect to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the eventual result would still be the same.

A restatement of respondents' constitutional defense is germane at this juncture. Only recently this Court reaffirmed the rule that states and their agencies are absolutely immune from suit in federal court by reason of the Eleventh Amendment to the United States Constitution. *Cory v. White*, _____ U.S. _____, 102 S.Ct. 2325, 72 L.Ed. 2d 694 (1982).

In that case the plaintiff contended that the State of California could not avail itself of the jurisdictional bar of sovereign immunity because the underlying action sought only prospective equitable relief against the state and, as such, the immunity recognized in *Edelman v. Jordan*, 415 U.S. 651 (1974), would not apply. In agreeing with respondent's argument, the Fifth Circuit Court of Appeals was not the first to misconstrue the *Edelman* opinion as holding that Eleventh Amendment immunity inures only when private parties seek to impose a liability which must be paid from public funds in the state treasury.

This Court granted certiorari in the *Cory* case in order to dispel any confusion concerning the breadth of the immunity under the Eleventh Amendment as to actions both at law and in equity. The Court held the span of that protection to be as follows:

> "*Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought. The Eleventh Amendment reads, 'The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, . . . ' Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition." *Cory v. White*, _____U.S._____, 102 S. Ct. at 2329, 72 L.Ed.2d at 699. (Footnote omitted.)

Thus, the underlying action here (which does not seek any form of relief against state *officials* or other individuals) is properly vulnerable to an Eleventh Amendment immunity bar as enunciated in *Cory*. This, of course, was the basis for the dismissal of the action by the district court and remains a viable defense today.

Petitioner has argued below that any sovereign immunity which might appear to be available to the states has been abrogated by Congress with respect to actions under section 504 of the Rehabilitation Act. Any claim of abolition of sovereign immunity, however, will be considered with the most stringent circumspection. The test is set forth in *Edelman v. Jordan, supra*, 415 U.S. at 673:

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)."

Neither the Rehabilitation Act of 1973, nor the relevant 1978 amendment thereto (29 U.S.C. § 794a), contains the requisite express language or manifests any implication that states were being stripped of their sovereign immunity under the Act. Where Congress *does* intend to abrogate states' immunity it knows how to expressly provide for same and, in fact, has done so. (*See, e.g.*, the definition of "persons" under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e(a)].)

It should be emphasized that every case which has considered sovereign immunity in the context of the Rehabilitation Act has held that defense to be a valid one. *Miener v. State of Mo.*, 673 F.2d 969, 980-983, (8th Cir. 1982), *cert. den.*, _____ U.S. _____, 103 S.Ct. 215 (1982); *Parks v. Pavkovic*, 536 F.Supp. 296, 311 n. 27 (N.D. Ill. 1982); *Riley v. Ambach*, 508 F.Supp. 1222, 1248 (E.D. N.Y. 1980), rev'd on other grounds, 668 F.2d 635 (2d Cir. 1981); *Hark v. School Dist. of Philadelphia*, 505 F.Supp. 727, 731 (E.D. Pa. 1980); *Jones v. Illinois Dept. of Rehabilitation Services*, 504

F.Supp. 1244, 1257 (N.D. Ill. 1981); *M.R. v. Milwaukee Public Schools*, 495 F.Supp. 864, 867 (E.D. Wisc. 1980); *Stemple v. Board of Ed. of Prince George's Cty.*, 464 F.Supp. 258, 262 (D. Md. 1979), aff'd on other grounds, 634 F.2d 893 (4th Cir. 1980), *cert. den.*, 450 U.S. 911 (1981); *Stubbs v. Kline*, 463 F.Supp. 110, 115-116 (W.D. Pa. 1978).

Moreover, in those cases listed above where the court also traced the history of the Act in response to an argument that the states' immunity had been *abrogated* or *waived*, in each instance the court found no merit to such a contention. *Miener v. State of Mo.*, *supra*; *Riley v. Ambach*, *supra*; *M.R. v. Milwaukee Public Schools*, *supra*; *Stemple v. Board of Ed of Prince George's Cty.*, *supra*.

Petitioner, however, has suggested in previous briefs that, because the Rehabilitation Act was enacted pursuant to the enforcement provisions of section 5 of the Fourteenth Amendment, there is a less strict test in examining the issue of abrogation than that quoted above in *Edelman*. The basis for this suggestion of a different standard is petitioner's misreading of the decisions in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Hutto v. Finney*, 437 U.S. 678 (1978).

Fitzpatrick involved a discrimination claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) against the Director of Connecticut's State Employees Retirement System in which plaintiff sought, *inter alia*, retroactive retirement benefits. The Court ultimately found that under Title VII, enacted pursuant to the Fourteenth Amendment, Congress had abrogated states' immunity. This result was not reached, however, as has been suggested by petitioner, merely through an analysis of legislative history aimed at determining an intent to subject states to suit. Rather, in the first instance, the

Court found that " 'The threshold fact of congressional authorization' . . . to sue the State as employer is clearly present."[2] *Fitzpatrick v. Bitzer, supra,* 427 U.S. at 452.

Thus, it is clear that the Court in *Fitzpatrick* conducted its analysis of legislative intent only *after* first satisfying itself as to the "express language or overwhelming implication" standard set forth in *Edelman*. This interpretation of the holding in *Fitzpatrick* comports with this Court's subsequent analysis of that decision in *Quern v. Jordan*, 440 U.S. 332, 343-344 (1979), where it was stated:

> "Our cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother Brennan is able to marshal. In *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973), the Court concluded that Congress did not lift the sovereign immunity of the States by enacting the Fair Labor Standards Act of 1938, 29 U.S.C. § § 201-219, because of the absence of any indication 'by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.' 411 U.S., at 285. In *Fitzpatrick v. Bitzer* the Court found present in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the 'threshold fact of

[2] 42 U.S.C. § 2000e(a), as mentioned earlier in this brief, explicitly includes "governments, governmental agencies and political subdivisions" within its definition of "person" under Title VII.

> congressional authorization' to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments . . . ."

In *Hutto v. Finney, supra*, this Court held that the Eleventh Amendment was not an impediment to the awarding of attorneys fees under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) in an underlying 42 U.S.C. § 1983 action. Finding that the award only involved an item of "expenses incurred in litigation," and since "costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity," the Court did not reach or reject the *Edelman* test on abrogation. *Hutto v. Finney, supra*, 437 U.S. at 695.

This appraisal of the limited application of *Hutto* is confirmed in *Quern v. Jordan, supra*, 440 U.S. at 344-345 n. 16:

> "While *Hutto*, unlike *Fitzpatrick* and *Employees*, did not require an express statutory waiver of the State's immunity, 437 U.S., at 695, 698 n. 31, the Court was careful to emphasize that it was concerned only with expenses incurred in litigation seeking prospective relief while the other cases involved retroactive liability for prelitigation conduct." (Footnote omitted.) *Accord, Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7.

Respondents submit, therefore, that *Fitzpatrick* and *Hutto* do not establish any new test, peculiar to legislation enacted pursuant to section 5 of the Fourteenth Amendment, for determining whether sovereign immunity has been abrogated. Rather, the standard for such an inquiry remains that pronounced by this Court in *Edelman v. Jordan, supra*, 415 U.S. at 673.

Employing the *Edelman* test, there is neither any "express language" nor "overwhelming implication" which can be derived from the texts of the statutes here involved that counsels a construction favoring abrogation under the Rehabilitation Act.[3] Moreover, even accepting the proposition that said Act was passed pursuant to section 5 of the Fourteenth Amendment and the argument that a test less strict than that in *Edelman* applies, the legislative history of the Rehabilitation Act indicates no intent to abrogate states' immunity. (*See, Miener v. State of Mo., supra*, 673 F.2d at 980; *Parks v. Pavkovic, supra*, 536 F.Supp. at 311 n. 27.)

In concluding this argument, respondents respectfully submit that the Eleventh Amendment immunity remains a valid defense to the instant action and for this reason the petition for writ of certiorari should be denied.

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[3]29 U.S.C. § 794a(a) (2) incorporates for the purposes of the Rehabilitation Act those remedies provided under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*). It is noteworthy that those cases which have considered the Eleventh Amendment in a Title VI context have upheld the states' immunity. *See*, e.g., *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979); *Sagan v. Com. of Pa.*, 542 F.Supp. 880, 881 (W.D. Pa. 1982).

III.

The Underlying Action Remains Subject To Dismissal Because Of Petitioner's Failure To Satisfy The Requirement That There Is A Nexus Between The Program Receiving Federal Assistance And The Program In Which Occurred The Alleged Discrimination

At the time respondents moved in the District Court to dismiss the complaint herein they expressly recognized that litigation under the Rehabilitation Act of 1973 was in an "embryonic stage." The existence of a private remedy under section 504 was just beginning to be acknowledged[4] and the requisite elements for asserting a proper claim thereunder were yet to be established.

One case which did address the issue of what constitutes a cognizable claim under section 504 was *Trageser v. Libbie Rehab. Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. den.*, 442 U.S. 947 (1979). That case held that since section 505(a)(2) of the Rehabilitation Act (29 U.S.C. § 794(a)(2)) incorporates the "remedies, procedures and rights" available to plaintiffs under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), the limitation found at section 604[5] of the latter Act attaches as well to section 504 actions. As a result, *Trageser* held

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[4]Since then (1979), nine different Circuits have accepted the viability of a private remedy under section 504. *See*, most recently, *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376 (11th Cir. 1982); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); and the remaining Circuit cases collected in *Pushkin, id.* at 1377.

[5]Section 604 (29 U.S.C. § 2000d-3) is reprinted in Appendix D of the petition. In cogent part, it literally precludes agency action against federal assisted employers except where a primary objective of the funding is to provide employment.

that a private action under section 504 "may not be maintained unless a primary objective of the federal financial assistance is to provide employment." *Id.*, 590 F.2d at 89.

In the case at bar the District Court rejected the holding in *Trageser*. The Ninth Circuit, of course, adopted it. In the few years subsequent to the *Trageser* decision several other Circuits have addressed the same issue. Those additional Circuits which have held that the primary purpose of the federal financial assistance at issue must be to provide employment in order for a claim to be stated by a private party under section 504 are: the *Second* (*United States v. Cabrini Medical Ctr.*, 639 F.2d 908 (1981)); and the *Eighth* (*Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (1980), *cert. den.*, 449 U.S. 892 (1981)).

To the contrary, two Circuits have refused to apply the restriction found in section 604 of Title VI to private actions under the Rehabilitation Act: the *Third* (*Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767 (1982), U.S. App. Pndg. (No. 82-862)); and the *Eleventh* (*Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376 (1982)).

Petitioner refers to and contrasts the above decisions in positing that there exists a clear conflict among the Circuits on this "standing" issue, a conflict which he urges should be resolved by the granting of certiorari herein. The treatment of this question by the Circuits, however, has not been as dichotomous as petitioner would make it out to be.

In reaching its conclusion regarding the materiality of the purpose of the federal funding at issue in section 504 actions, the *Trageser* court observed:

> "Thus, because of § 604, Title VI does not provide a judicial remedy for employment dis-

> crimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." *Trageser v. Libbie Rehab. Center, Inc., supra*, 590 F.2d at 89. (Footnotes omitted.)

The opinion in *Trageser* thereupon proceeded to conclude that "we must apply the limitation contained in § 604 of Title VI to § 504 of the Rehabilitation Act." *Id.*, 590 F.2d at 89. In summarizing its holding, however, the court mentioned only the first of the above-quoted two limitations derived from section 604 as constituting an essential element of a section 504 claim. *Id.*.

It is *that* portion of the *Trageser* and *Carmi* opinions, which requires that federal funds be employment-related, with which the contrary *Le Strange* and *Jones* decisions (and also the dissent below) disagree. The language, legislative history and administrative treatment of the relevant statutes, including not only the Rehabilitation Act, but Titles VI and IX (20 U.S.C. § 1681 *et seq.*) as well, have been exhaustively surveyed by courts on both sides of the issue[6] and will not be recounted at this stage.[7] Those analyses, suffice to say, have led the courts to differing results as to the necessity for plaintiffs to plead and prove an employment objective of the federal funds at issue.

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[6] *See*, e.g., *Carmi v. Metropolitan St. Louis Sewer Dist., supra*, 620 F.2d at 674-675. *Compare, Le Strange v. Consolidated Rail Corp., supra*, 687 F.2d at 769-776.

[7] Since respondents assert that the petition herein should be denied because the underlying action is deficient in other respects, this brief will not attempt to argue the merits of the holding below and its reliance on the doctrine established in *Trageser*. That effort would seem to be best reserved for future briefing should certiorari be granted.

On the other hand, there has emerged at the same time a consensus among the Circuits respecting a different prerequisite to § 504 actions. Specifically, a claimant, even if he or she is an employee who alleges discrimination by an employer which receives any form of federal financial assistance, must allege and show that there is a nexus between the program receiving federal assistance and the program in which occurred the alleged discrimination.

In *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982), this rule finds its most recent and expositive declaration:

> "Doyle's claim under § 504 of the Rehabilitation Act of 1973 is premised on the proposition that the University of Alabama was under a federally enforceable duty not to discriminate against her on the basis of her handicap simply because it was a recipient of federal funds. There is no question that the University of Alabama, a multi-program entity, receives federal funds for some of its programs. But this fact alone does not subject the entire university to liability under § 504. The District Court dismissed the § 504 on the grounds that Doyle did not specifically allege that she was an employee of a program that benefited from federal funds. After the District Court rendered its decision, the former Fifth Circuit, in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981) held, after a careful analysis of the language and legislative history of § 504, that 'it is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A

> private plaintiff in a section 504 case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance. (footnotes omitted)' *Brown v. Sibley*, 650 F.2d at 769. Since Doyle does not allege that the program by which she was employed was 'directly benefited by federal financial assistance,' her § 504 claim was correctly dismissed." *Id.*, 680 F.2d at 1326-1327.

It should be noted that in *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981), quoted above, the court posited this requirement "on the basis of the language of section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX."

In *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1232 (7th Cir. 1980), the same point was phrased as follows:

> "The statute (section 504) does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.
>
> "The parties have not cited us to any discussion of § 504 in the legislative history which might shed further light on this issue. Neither has our research revealed any extensive consideration

> of the point in the committee reports which accompanied the adoption of § 504 in the Rehabilitation Act of 1973 and the further changes added by the Rehabilitation Act Amendments of 1974 and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. However, there is certainly nothing in the brief references to § 504 in the committee reports which precludes the restriction of recovery under the section to persons directly or indirectly benefiting from the federal financial assistance in question. In fact, these references support our interpretation that to be actionable the alleged discrimination must be in connection with a federally funded program or activity." (Footnote omitted.) (Insert added.)

Lastly, in *Jones v. Metropolitan Atlanta Rapid Transit Authority, supra,* 681 F.2d at 1382, where the court expressly rejected *Trageser* and its progeny, the opinion cites with approval both the *Doyle* and *Brown* decisions concerning this separate nexus requirement.

It is significant to note that in arriving at this standing prerequisite these cases did not rely on an application of section 604 of Title VI to section 504 remedies. Nor did they reach their conclusion due to any adherence to the *Trageser* rationale. Rather, for the most part, it was felt that such a construction was compelled by the very language of section 504 itself, which bears repeating here:

> "No otherwise qualified handicapped individual . . . shall . . . be excluded from *the participation in*, be denied *the benefits of*, or be *subjected to discrimination under* any program or activity receiving Federal financial assistance . . ." (Emphases added.)

Had Congress intended that a recipient of federal assistance be subject to private actions notwithstanding the absence of any nexus between the program receiving the assistance and the program with which the potential claimant is involved, it simply could have written or amended section 504 to read:

> "No qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity [*by any recipient of*] Federal financial assistance . . ."

To have so phrased section 504, of course, would have been inconsistent with the prohibitory language which is found in Title VI (29 U.S.C. § 2000d) and Title IX (20 U.S.C. § 1681), after which section 504 is supposedly patterned.[8]

The recent decision of this Court in *North Haven Bd. of Ed. v. Bell*, _____ U.S. _____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), supports this analysis. The principal focus of the Court's attention in that case was directed toward determining whether Title IX proscribes employment discrimination in federally funded programs, irrespective of the fact that the primary purpose of such funds may not have been to provide employment. This Court's resolution of that issue, however, did not end its inquiry.

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[8]It is also noteworthy that the relevant administrative regulations, unlike a previous unsuccessful effort at expanding the scope of section 504 (*Southeastern Community College v. Davis*, 442 U.S. 397 (1979)), make no attempt at broadening or otherwise modifying this standing or nexus prerequisite. (*See*, e.g., 45 C.F.R. § § 84.4, 84.11.)

Expressing a restriction in terms of "program specificity," the Court held that termination of an offending recipient's financial assistance by the federal agency is "limited to the particular entity and program in which such noncompliance has been found." *Id.*, 102 S.Ct. at 1926. This constraint on the scope of governmental action was found by the Court to be compelled from a reading of the relevant Title IX statutes and regulations. Specifically, the prohibitory language of section 901(a) of Title IX, which is nearly identical to section 504 of the Rehabilitation Act, was held to be program-specific; and the adoption in the Title IX regulations of case law applying a program-specific restriction on termination of Title VI funds was found to be consistent with such an interpretation of the statute. *Id.*, 102 S.Ct. at 1926.

The *North Haven* treatment concerning the permissible breadth of *agency* action against Title IX assistance recipients provides a template from which can be drawn the manner in which this Court would define the breadth of *private* actions pursuant to Title IX and the Rehabilitation Act.[9] In this regard, respondents submit that the Court's "program-specific" restriction respecting agency action is the parallel concept to the "program nexus" limitation recognized by the courts in private actions. In each area the courts have required that there be a *programmatical* connection between the discrimination or noncompliance, on the one hand, and the identity of the federal assistance, on the other.

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[9]Not only are the statutes, section 901(a) of Title IX and section 504 of the Rehabilitation Act, virtually identical in their program-specific language, but the regulations implementing section 504 incorporate the very Title VI procedures and sanctions adopted under Title IX and which this Court found persuasive in *North Haven*. The regulation under section 504 which incorporates the Title VI regulations is found at 45 C.F.R. § 84.61. The incorporating regulation under Title IX is 34 C.F.R. § 106.71. The subject Title VI regulations are at 45 C.F.R. §§ 80.6-80.11.

Thus, a federal recipient is not to be subjected to the prospect of losing its funding *in toto* or as to certain programs, or be subjected to potential private liability with respect to such programs, where the alleged noncompliance or discrimination occurs in other unrelated programs.

Our next reference, then, is to the allegations of the complaint at issue. As described by petitioner at page 4 of his petition, he has alleged that respondents were the recipients of federal financial assistance and refused to hire petitioner for a specific job position. No reference is made in the complaint as to the nature of the assistance received or the program or activity to which it related. Nor is there any assertion in the pleading that there was any connection between the program giving rise to the job for which petitioner had applied and the program under which respondents received assistance.

Given this state of the pleadings, petitioner finds himself in the same position as that of the plaintiffs in *Doyle v. University of Alabama In Birmingham, supra,* 680 F.2d at 1327, and *Simpson v. Reynolds Metals Co., Inc., supra,* 629 F.2d at 1231-1232, wherein the courts affirmed dismissal of the actions for a similar pleading defect.

Once again, then, as with the sovereign immunity issue addressed *supra*, it is seen that a grant of certiorari, and even a resolution in petitioner's favor on what can be termed the *Trageser* rule, does not save petitioner's day. His action would still be properly subject to dismissal under the immunity grounds and/or the standing or nexus grounds just articulated, on which issues there is no conflict in the Circuits.

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on December 30, 1982, I served the within *Respondents' Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fullv prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 30, 1982 at Santa Monica, California.

Kirk W. Harney
Original signed